No. 12,460

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT NELSON LANTIS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court, Territory of Hawaii.

REPLY BRIEF FOR APPELLANT.

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ARGUMENT.

I. THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE FIRST COUNT IN THE INDICTMENT.

It is conceded by the Government that in order to convict one as a conspirator in a conspiracy involving only two persons, it must be proved that both conspirators had the requisite knowledge and intent. Knowledge and intent of one alone is not sufficient (Brief of Appellee, p. 3).

The Government likewise concedes that in order to have a violation of Section 80 of Title 18, United States Code, it is not only necessary that a false statement be filed with the Government or a department or

agency thereof, but it is also essential that the person filing the statement know that it is false (Brief of Appellee, p. 4).

The Government also concedes that a necessary element of the crime of conspiracy is intent to commit every element of the substantive offense which is the object of the conspiracy (Brief of Appellee, p. 5).

It follows consequently that both conspirators must have had the necessary knowledge and intent to commit every element of the substantive offense charged as the object of the conspiracy.

The Government contends that two objects of the conspiracy are charged in the indictment (Brief of Appellee, p. 6). The appellant concedes that the first stated object, to-wit, the violation of Title 18, Section 80, United States Code, is specifically stated in the first count of the indictment (R. 2-4). The Government is in error, however, in its statement that a second object of conspiracy is set out in the first count of the indictment, to-wit, the purchase under Veterans' Priorities of a surplus vehicle for the defendant, which purchase was in violation of Section 1625, Title 50, Appendix, United States Code, and the regulations promulgated thereunder (Brief of Appellee, p. 6).

The Government could have framed its indictment so as to aver a single conspiracy to violate one or more statutes, and proof of conspiracy to violate any one of such statutes would have been sufficient to support conviction. *United States v. Bates,* 141 F. (2d) 436 (7th Cir. 1944), 148 F. (2d) 907 (7th Cir. 1945); *United States v. Mack,* 112 F. (2d) 290, 292 (2nd Cir.

1940). But the Government did not do so. It charged violation of only one statute, Title 18, United States Code, Section 80 (R. 2-4). The judgment was one of conviction for conspiring to cause to be made false statements and certificates upon application to purchase surplus war materials from the Surplus Property Office "as charged" in Count I of the indictment (R. 8-9).

The opening statement of counsel for the Government explained the indictment as charging the defendant "with having conspired with one Oliver Abreu to violate Section 80, Title 18, U. S. Code", and further, "It is a conspiracy to submit a false statement contrary to law" (R. 33-34). Nowhere in the proceedings below is any reference made to Section 1625, Title 50, Appendix, United States Code, or of any regulations promulgated thereunder.

The interjection of this section and of these regulations at this stage in the proceedings is obviously an afterthought of the Government, and does not furnish the basis of either the indictment or judgment of conviction below.

It is from a judgment of conviction for violation of Title 18, Section 80 of the United States Code that this appeal was taken, and it is on the basis of the statutory requirements of that section that this Court must affirm or deny the judgment of the trial court.

Just as it is fundamental that the Government cannot charge one crime and prove another, *Kepl v. United States,* 299 Fed. 590, 591 (9th Cir. 1924); *Moss v. United States,* 132 F. (2d) 875 (6th Cir.

1943), so the Government cannot secure a conviction for conspiracy to violate a specific statute and justify the conviction on appeal by claiming the judgment of conviction can be sustained as a violation of another statute.

II. ABREU'S LACK OF KNOWLEDGE REQUISITE FOR THE VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 80, AND HIS LACK OF KNOWLEDGE THAT DOCUMENTS TO BE FILED WERE FALSE AND FRAUDULENT.

The Government contends that it is not necessary to prove that conspirators knew the object of their machinations were unlawful or fraudulent (Brief of Appellee, p. 9). In support of this statement, five cases are cited. An analysis of the cases shows, however, that in each one of them, the object of the conspiracy was of such a character that, whether known to be violative of a statute or not, it was inherently wrongful and corrupt.

Thus, in the *Hamburg-American Steam Packet* case, 250 Fed. 747 (2nd Cir. 1918), the court found (p. 759) that the act which was the object of the conspiracy "was not innocent, but dishonest and fraudulent" involving "false oaths" and "corrupt conduct". This is hardly the type of case that can be characterized as one in which the conspirators did not know or should not know that the object of their conspiracy was unlawful or fraudulent. In *United States v. Mack,* 112 F. (2d) 290, 292 (2nd Cir. 1940), the court characterizes the case as one abounding in "corrupt motive". In *Blumenthal v. United States,* 88 F. (2d) 522, 530, 531 (8th Cir. 1937), the court found many attend-

ing circumstances pointing to "guilty knowledge" and "criminal intent". In the *Cruz* case, 106 F. (2d) 828 (10th Cir. 1939), it was stated that the jury could properly find a corrupt motive, an evil design or a wrongful purpose arising out of a scheme "highly reprehensible", "closely analogous to extortion", and "shocking to moral sensibilities". Finally, in *United States v. Keegan,* 141 F. (2d) 248, 254 (2nd Cir. 1944), the defendants knew of the existence of the Selective Training and Service Act that they were charged with having conspired to violate. Indeed, the violations of the act were caused by their desire to test the constitutionality of the legislation. This certainly is not a case standing for the proposition that it is unnecessary for the Government to prove that conspirators knew the object of their conspiracy was unlawful or fraudulent.

It thus appears that in none of the cases cited by the Government in support of the principle advanced by it is the principle enunciated as the decision of the case, but at most is only dicta therein.

As has been pointed out in appellant's brief, pages 11 to 17, a review of all of the cases indicates that in the absence of proof of knowledge on the part of the conspirators that the act to be performed by them is unlawful or is of such a nature as to be obviously unlawful, it is necessary for the Government to prove as a necessary element of the conspiracy that the conspirators knew that the object of their conspiracy was violative of law.

While the appellant concedes that it is a general principle of criminal law that ignorance of the law is

no defense to indictment for its violation (Brief of Appellee, p. 10), it is urged that this principle has no application in the law of conspiracy. While generally in the law of crimes an intent to commit a crime is not indictable as a crime, a conspiracy, which is a combination of intents to commit a crime, is criminal. This is so, as pointed out by *Harno* in *Intent in Criminal Conspiracy,* 89 U. of Pa. L. Rev. 624, 629, by the nature of the crime:

> "* * * The confederation of Roe and Doe through agreement to commit an anti-social act, no doubt, increases their potential dangerousness to the community. But this agreement is so slight an act that, taken by itself, it seems fairly insignificant. It is only as we consider this act in relation to the threat Roe and Doe present to the peace of the community because of the intent they hold that a rationale for the crime can be found. The potential danger to the community is heightened through the agreement, that is, through the act of uniting their intentions, but the full significance of the peril they hold for others can only be understood in terms of their purpose or intent. The intent of each held separately makes each of them potentially dangerous but not a criminal. Their act of agreement, though but a factor of slight added significance, marks them criminals."

It is submitted that if the act contemplated is not inherently anti-social or cannot be characterized as "corrupt conduct" or cannot be said to be inspired by a "corrupt motive" or the object of "evil design", then, in order to be criminal, the act contemplated must be in violation of a statute and known by the

conspirators to be such. In other words, they must contemplate morally reprehensible conduct or contemplate conduct known by them to be violative of statutory law.

An agreement to do an act not morally reprehensible or reasonably suspect of being such, and not known to be violative of statutory law, is not the sort of agreement that constitutes a criminal conspiracy.

The Government concedes that the purchase of a surplus jeep by Abreu under Veterans' Priorities was *mala prohibita* (Brief of Appellee, p. 10). Further, it is obvious that such conduct could not be called corrupt in the absence of knowledge of its illegality. Under such circumstances, the *Cruz* and the *Keegan* cases do not apply. Similarly, the *Hamburg-American Steam Packet, Mack* and *Blumenthal* cases are equally inapplicable.

The Government concedes that it was required to prove, for a conspiracy to violate Title 18, United States Code, Section 80, that the conspirators intended to file false statements knowing they were false (Brief of Appellee, p. 9). An examination of the record fails to reveal that this burden has been met (Brief of Appellant, pp. 20-22).

CONCLUSION.

For the reasons set out in brief of appellant as well as for the reasons herein contained, it is respectfully submitted that:

1. The evidence presented to the trial court was insufficient as a matter of law to sustain the

first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to violate 18 U.S.C. § 80 in that the evidence failed to establish that both conspirators knew of the existence of this statute.

2. The evidence presented to the trial court was insufficient as a matter of law to sustain the first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to present to the Territorial Surplus Property Office a false and fraudulent application in that there was a failure of proof that both of the alleged conspirators knew that any statement filed was, in fact, false or fraudulent.

3. The evidence presented to the trial court was insufficient as a matter of law to sustain the first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to violate 18 U.S.C. § 80, the evidence failing to establish that both of the alleged conspirators knew that any object of the alleged conspiracy was violative of Federal law.

Wherefore, the appellant prays that the conviction of the lower court for violation of the first count of the indictment be reversed and that the appellant be acquitted thereof.

Dated, Honolulu, T. H.,
July 31, 1950.

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By J. EDWARD COLLINS,
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